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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1736

WALTER J. MEYER,

Petitioner,

vs.

LOUIS J. FRANK, Commissioner of Police, Nassau County Police Department, and CHRISTOPHER QUINN, Trial Commissioner and Inspector, Nassau County Police Department,

Respondents.

BRIEF IN OPPOSITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ARGUMENT

It is petitioner's contention that in a civil rights action under Title 42 U.S.C. §§1983 and 1985, the applicable three-year New York statute of limitations should be tolled during the period petitioner sought a remedy in New York State courts. Petitioner requests that this Court issue a Writ of Certiorari and review the order of the United States Court of Appeals for the Second Circuit filed March 9, 1977, which denied en banc reconsideration of the judgment of the United States Court of Appeals for the Second

Circuit, decided January 12, 1977. The Court of Appeals held that the considerations of federalism urged by petitioner were insufficient to outweigh the statute of limitations policy. Respondent respectfully submits that certiorari should be denied.

Petitioner was dismissed from the Nassau County Police Department on June 4, 1971. It was at this time that his right to a Civil Rights Act suit accrued.

When Congress fails to provide a statute of limitations for a federally created cause of action, federal courts should adopt the applicable statute of limitations prescribed by the state in which the controversy originates. (*U.A.W.* v. *Hoosier Corporation,* 383 U.S. 696, 86 S. Ct. 1107, 16 L. Ed. 2d 192 [1966]; *Swan* v. *Board of Education,* 319 F. 2d 56 [2d Cir. 1963]). This principle is applicable to Civil Rights Act suits. (*Johnson* v. *Railway Express Agency,* 421 U.S. 454, 44 L. Ed. 2d 295 [1975]). State procedural rules which are outcome-determinative shall be followed by a federal court in a nondiversity action brought to enforce a federally created right. (See Hill, State Procedural Law in Federal Nondiversity Litigation, 69 Harv. L. Rev. 66). The three-year statute of limitations prescribed by New York Civil Practice Law and Rules §214(2) (McKinney's Cons. New York Statutes Anno.) is the most appropriate state statute. (*Montagna* v. *O'Hagan,* 402 F.S. 178, D.C.N.Y. 1975).

Thus, absent a tolling of the statute, petitioner's civil rights action would be barred by the statute of limitations.

Petitioner's initial contention is that a tolling principle is necessary to assure a state court litigant of his supplemental remedies afforded by a §1983 action. Petitioner's contention is without merit. Clearly, one need not exhaust state judicial remedies before he may institute a Civil

Rights Act suit. (*Monroe* v. *Pape,* 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 [1961]). As the Court in *Monroe* v. *Pape, supra* stated:

> "The Federal remedy is supplemental to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." 365 U.S. at 183, 16 L. Ed. 2d at 503.

Furthermore, as this Court noted in *Johnson* v. *R.E.A., supra,* "the plaintiff in his §1981 suit may ask the court to stay proceedings" until his other remedies have been exhausted. 421 U.S. 454 at 465, 44 L. Ed. 2d 295 at 304.

Petitioner urges adoption of the rule permitting tolling of a statute of limitations as enunciated in *Mizell* v. *North Broward Hospital District,* 427 F. 2d 468 (5th Cir. 1970), reh. en banc (1970). It must be noted that the *Mizell* rule urged by petitioner has not been adopted in subsequent cases. See *Blair* v. *Page Aircraft Maintenance, Inc.,* 467 F. 2d 815 (5th Cir. 1972), *Jenkins* v. *General Motors Corp.,* 354 F.S. 1040 (3d Cir. 1973), *Ammulung* v. *City of Chester,* 494 F. 2d 811 (3d Cir. 1974), *Graffals Gonzalez* v. *Garcia Santiago,* 415 F.S. 19 (1st Cir. 1976), and *Greene* v. *Carter Carburetor Co.,* 532 F. 2d 125 (8th Cir. 1976).

The court in *Blair, supra,* noted that the tolling of a state statute "would deprive the employer of the right conferred by Congress to expect suit within the time required by law, or not at all, which, of course, is the purpose of all statutes of limitations." at p. 820. Judge Tuttle, author of *Mizell,* stated in his dissent in *Blair* that *Mizell* was reversed *sub silentio. Blair,* at p. 821.

In *Ammulung, supra,* the court, in refusing to apply the *Mizell* principle, stated:

> "Furthermore, given the absence of a federal limitation period in the Civil Rights Act, the court has no basis

for fashioning federal tolling principles, and due regard for our system of federalism requires that state concepts of tolling be applied to state statutes of limitations." At p. 816.

It should be noted that in New York, the tolling of a statute of limitations usually relates to disability of plaintiff (CPLR §208, *Oritz* v. *La Vallee*, 442 F. 2d 912 [2d Cir. 1971]), or some bad faith conduct on the part of defendant (*Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231 [1959]). There are no such factors in the present case.

Petitioner relies heavily upon the dissenting opinion of Judge Oakes in *Meyer* v. *Frank*, 550 F. 2d 726 (2d Cir. 1977) to support his argument in favor of adopting the *Mizell* approach. Judge Oakes notes that *Guerra* v. *Manchester Terminal Corp.*, 498 F. 2d 641 (5th Cir. 1974) is evidence that *Mizell* remains good law. But *Guerra, supra,* and other cases that permit a tolling of a statute of limitations, invariably deal with the seeking of an administrative remedy created by Congressional enactment, prior to plaintiff's bringing suit under the Civil Rights Act in Federal court (e.g., the filing of charges with the EEOC, HEW or under FELA). See *Taliaferro* v. *Dykstra*, 388 F.S. 957 (4th Cir. 1975) and *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965). As the Court noted in *Burnett*, a tolling principle was necessary to implement the national policy of a uniform time bar clearly expressed by Congress when it enacted the FELA limitations provision. 380 U.S. at 434, 13 L. Ed. 2d at 948.

Petitioner cites *Kaiser* v. *Cahn*, 510 F. 2d 282 (2d Cir. 1974) and *Lombard* v. *Board of Education*, 502 F. 2d 631 (2d Cir. 1974) as decisions in harmony with the principles of *Mizell*. The question in *Kaiser* v. *Cahn, supra,* however, was limited to the effect that imprisonment and release

of a prisoner on bail would have on the tolling of a statute of limitations. "Nothing in *Kaiser* compels a decision that the statute should be tolled by the State Court action." (*Meyer* v. *Frank*, 409 F. Supp. 1240 at 1242 [E.D.N.Y. 1976]). *Lombard* may also be distinguished from the present case in that plaintiff in *Lombard* did not raise any constitutional issues in state or administrative proceedings. While petitioner raised the Constitutional issue of the right to be represented by counsel in his Article 78 proceeding.[1] Thus, under *Lombard*, plaintiff's right to bring a Civil Rights Act suit was based on the finding that the State court claim was different from the Federal court claim. In the instant case, one wonders if petitioner is seeking "two bites at the cherry" as he raised a Constitutional issue in his Article 78 proceeding and now seeks to raise Constitutional issues in his Civil Rights Act suit. *Lombard, supra,* at 637.

Finally, in considering petitioner's argument that support of a tolling principle lies in consideration of promoting the interests of federalism, see the majority opinion in *Meyer* v. *Frank*, 550 F. 2d 726 (2d Cir. 1977) at 29, (Petitioner's Brief, Appendix B at 14a). The appellate court below observed the following:

> "Meyer invites us to apply *Mizell* here. Assuming arguendo our agreement with the result reached there, the history of the instant litigation forecloses application here of the full force of the Fifth Circuit's reasoning. Meyer did not restrict his Article 78 petition to

[1] On July 15, 1971 the Article 78 petition was dismissed by Justice Pittoni of the Nassau County Supreme Court. The Appellate Division, Second Department, affirmed without opinion on October 10, 1972, 40 App. Div. 2d 760, 336 N.Y.S. 2d 239 (2d Dept. 1972), and denied Meyer's motion for reargument on January 19, 1973. In May 1973, the New York Court of Appeals denied leave to appeal (mot. for lv. den. 32 N.Y. 2d 612).

> claims grounded in state law. Alleged violations of his Sixth Amendment rights to counsel and confrontation of witnesses were at the core of his petition. This is not a case like *Mizell* where the prior state court proceeding was directed at obtaining relief through an action grounded solely in state law. . . The only thing Meyer has held in reserve has been the federal court itself, federal law has played a principal role all along. The result is that the policy of avoiding federal interference with state affairs survives here in a diluted posture."

Petitioner, here, has slept on his rights and should not now be able to assert a federal claim. (*Burnett* v. *N.Y. Central R. Co., supra,* at 428.)

Petitioner, like plaintiff in *Mizell,* "chose his forum and litigated to the last ditch." *Mizell, supra,* at 476. Chief Judge Coleman's dissenting opinion in *Mizell* observed that Dr. Mizell having lost in state courts was then permitted to start over in federal courts. Judge Coleman then asked the rhetorical question that is equally applicable here: "Federalism, where art thou?". *Mizell,* Id.

Where Congress has created a cause of action without limiting the time within which it may be brought, it is reasonable to infer . . . that adoption of the limitation periods of the State is what Congress did intend. Hill, State Procedural Law in Federal Nondiversity Litigation, 69 Harv. L. Rev. 66, at 97.

It is suggested that if a tolling principle as enunciated in *Mizell* is ever deemed desirable, it should come from the Legislature.

CONCLUSION

For the reasons stated above, the petition should be denied in all respects.

Respectfully submitted,

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